Rachel Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as the executor for the estate of Ong Soon Hoe, deceased)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2-24-128 OF 1997
KAMALANATHAN RATNAM JC
17 NOVEMBER 1997

Succession *— Executors — Revocation of appointment — Application to remove executor for lack of diligence and act of wilful default while acting in capacity as executor — Hostility between executor and beneficiaries — Beneficiaries of full age — Whether administration of estate by executor should be put to an end*

The plaintiffs are the absolute beneficiaries of the estate of the late Ong Soon Hoe ('the deceased') and are of full age. The deceased left a will naming the defendant as the sole executor and trustee of his will. Pursuant to the will, the deceased bequeathed all his assets, both moveable and immoveable, to the plaintiffs. The defendant was accordingly appointed executor and trustee of the will. The plaintiffs applied to have the defendant removed and/or substituted as the executor/trustee of the deceased's estate for the defendant's lack of diligence and/or act of wilful default while acting in his capacity as the executor/trustee of the estate. The plaintiffs' — citing several examples — contended that from the time the defendant was appointed as the executor he had acted in a dilatory manner in administering the estate.

Held:

Except in cases where on the true construction of the will, the gift is contingent on the legatee attaining the given age, it is clear that if there are several beneficiaries who are all of one mind, and who are not under any legal disability, they may — as in this case — if they so wish, extinguish the trust without reference to the trustees. This is especially so when there is hostility between the beneficiaries and the executor.

In this case, the plaintiffs have accused the defendant of overcharging and of dereliction of duty. As a result, it is unpalatable for the defendant to continue to perform this onerous task. Moreover, it is obvious that the parties are unable to work together for the benefit of the estate. In the circumstances, there is sound reason to excuse the defendant from being the executor/trustee of the estate and to put an end to the administration of the estate by the executor since both the beneficiaries are now majors and are personally entitled to the assets of the estate. After all, even the defendant agrees that almost 90% of the administration of the deceased's estate has been

duly completed. Accordingly, the plaintiffs being of full age shall be made administrators of the balance of the estate thus far unadministered (see pp 267B, 268H–I and 269A); *Gosling v Gosling* (1859) John 265; *Commissioners of Inland Revenue v Executors of Hamilton-Russell* [1943] 1 All ER 474; *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 and *Letterstedt (Now Vicomtesse Montmort) v Broers & Anor* (1884) 9 AC 371 followed.

Obiter:

According to s 43 of the Probate and Administration Act 1959, the power of awarding a commission to the executor lies solely at the discretion of the court after taking into account the conduct of the executor in administering the estate. The defendant ought not to be allowed to fix an arbitrary figure as his fees. There should be an application to the court under s 43 supported by evidence of his conduct in administering the estate so that the court may assess and make an order allowing him a commission of not more than 5% of the total value of the estate (see p 265H–I).

[Bahasa Malaysia summary

Plaintif-plaintif adalah benefisiari-benefisiari mutlak kepada harta pusaka Ong Soon Hoe ('si mati') dan telah cukup umur. Si mati meninggalkan wasiat menamakan defendan sebagai wasi dan pemegang amanah tunggal wasiatnya. Mengikut wasiat itu, si mati mewasiatkan semua asetnya, harta alih dan tidak boleh alih, kepada plaintif-plaintif. Defendan telah dilantik sebagai wasi dan pemegang amanah wasiat itu. Plaintif-plaintif memohon untuk menyingkirkan defendan dan/atau untuk menggantikan defendan sebagai wasi/pemegang amanah wasiat harta pusaka si mati kerana defendan tidak mempunyai ketekunan dan/atau bertindak secara salah dengan sengaja dalam keupayaannya sebagai wasi/pemegang amanah harta pusaka. Plaintif-plaintif — menyebut beberapa contoh — berhujah bahawa daripada masa defendan dilantik sebagai wasi beliau telah bertindak secara berlengah-lengah dalam menguruskan harta pusaka itu.

Diputuskan:

Melainkan dalam kes-kes di mana atas pentafsiran sebenar wasiat, alang adalah kontingen atas penerima legasi mencapai umur yang diberikan, adalah jelas bahawa jika terdapat beberapa benefisiari yang kesemuanya bersependapat, dan tidak berada di bawah apa-apa ketidakupayaan undang-undang, mereka boleh — seperti dalam kes ini — sekiranya mereka berhasrat, memadamkan amanah tanpa merujuk kepada pemegang amanah, terutamanya apabila terdapat permusuhan di antara benefisiari-benefisiari dan wasi.

Dalam kes ini, plaintif-plaintif telah menuduh defendan mengenakan caj yang berlebihan dan keabaian tugas. Akibatnya,

adalah tidak dapat diterima bagi defendan untuk terus menjalankan tugas yang berat ini. Tambahan pula, adalah jelas bahawa pihak-pihak tidak boleh bekerjasama untuk manfaat harta pusaka itu. Dalam keadaan-keadaan itu, terdapat alasan yang bagus untuk melepaskan defendan daripada menjadi wasi/pemegang amanah harta pusaka itu dan untuk mengakhiri pengurusan harta pusaka itu oleh wasi kerana benefisiari-benefisiari kesemuanya adalah cukup umur dan berhak secara individu kepada aset-aset harta pusaka itu. Lagi pun, defendan bersetuju bahawa hampir 90% daripada pengurusan harta pusaka si mati telahpun disiapkan. Oleh itu, plaintif-plaintif yang cukup umur boleh dijadikan pentadbir-pentadbir baki harta pusaka itu yang belum ditadbirkan (lihat ms 267B, 268H–I dan 269A); *Gosling v Gosling* (1859) John 265; *Commissioners of Inland Revenue v Executors of Hamilton-Russell* [1943] 1 All ER 474; *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 dan *Letterstedt (Now Vicomtesse Montmort) v Broers & Anor* (1884) 9 AC 371 diikut.

Obiter:

Mengikut s 43 Akta Probet dan Pentadbiran 1959, kuasa memberikan komisyen kepada wasi terletak dalam budi bicara mahkamah selepas mengambil kira tindak-tanduk wasi dalam menguruskan harta pusaka. Defendan tidak sepatutnya dibenarkan untuk menetapkan angka sembarangan sebagai fee. Mesti terdapat permohonan kepada mahkamah di bawah s 43 yang disokong oleh keterangan mengenai tindak-tanduknya dalam menguruskan harta pusaka itu supaya mahkamah boleh membuat taksiran dan membuat perintah membenarkan komisyen yang tidak melebihi 5% daripada nilai jumlah harta pusaka (lihat ms 265H–I).]

Notes

For cases on reovation of appointment of an executor, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1828–1901.

Cases referred to

Commissioners of Inland Revenue v *Executors of Hamilton-Russell* [1943] 1 All ER 474 (folld)

Gosling v *Gosling* (1859) John 265 (folld)

Man bin Mihat, decd, Re [1965] 2 MLJ 1 (refd)

Letterstedt (Now Vicomtesse Montmort) v Broers & Anor (1884) 9 AC 371 (folld)

Lim Kar Bee v *Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281 (refd)

Stephenson (Inspector of Taxes) v *Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 (folld)

Legislation referred to

Civil Law Act 1956 ss 21, 23(1)

Contracts Act 1950 s 24(b)
Rules of the High Court 1980 O 80 r 2(3), (e)
Probate and Administration Act 1959 s 43
Trustee Act 1949 ss 45(1)(a), 60(1)

Balbinder Kaur (*Rozilawathi bte Ariffin* and *Izzat Othman* with her) for the plaintiffs.

J Chandra (*Arbain Chandra Chew & Associates*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam JC:

Facts

The plaintiffs in this action are the absolute beneficiaries of the estate of the late Ong Soon Hoe @ Patrick Ong ('the deceased'). They are the only two daughters of the deceased and are of full age. The deceased died on 21 September 1994, leaving a will dated 6 March 1989 and naming the defendant as the sole executor and trustee of his will. A provision was made that in the event the defendant predeceased the deceased, then one Tan Sri Datuk Augustin Ong Soon Hock (Tan Sri) was named as the alternate executor/trustee. Pursuant to the will, the deceased bequeathed all his assets, both moveable and immoveable, to the plaintiffs. The defendant was appointed executor and trustee on 17 August 1996 by the Shah Alam High Court on 17 August 1997.

The application

This is the plaintiffs' application against the defendant (encl 1) to have the defendant removed and/or substituted as the executor/trustee of the deceased's estate for the defendant's lack of diligence and/or act of wilful default while acting in his capacity as the executor/trustee of the estate of the deceased.

Plaintiffs' case

It is the plaintiffs' contention that from the time the defendant was appointed as the executor he had acted in a dilatory manner in administering the estate. The defendant had ignored and defied the plaintiffs' wishes and refused to supply the plaintiffs with relevant information pertaining to their late father's estate. With regard to lack of diligence and unreasonable conduct, the plaintiffs gave examples.

Engaging two firms of solicitors

It was pointed out that the defendant had engaged two firms of solicitors to attend to the probate of the deceased's estate and that the estate had to pay legal fees to both the firms. The earlier solicitors, Messrs Sri Ram & Co, had billed RM21,000 for work done. It was the contention of the

plaintiffs that the defendant had failed to inform the plaintiffs the nature of the work that was attended to by the earlier solicitors. He had also failed to inform them nor did he advise the plaintiffs of the reason for a change of solicitors to the present solicitors. The defendant had stated that the fees of the present solicitors was RM15,580 as shown by their bill dated 29 June 1996, whereas in disclosing the liabilities in respect of the probate, the defendant had stated 'Yuran Peguamcara RM31,000'. The plaintiffs therefore argued that the defendant had failed to provide an explanation as to how the legal fees was calculated to amount of RM31,000 when the bill from the present solicitors indicated a sum of RM15,580. This they contended was a clear example of the defendant's failure to keep proper accounts of the estate.

In reply, the defendant contended that whilst the agreed fees for Messrs Sri Ram & Co was RM21,000, upon being discharged after an initial sum of RM10,500 had been paid, the said solicitors had insisted on the full balance or they wished to tax their bill. The balance had not as yet been settled. In respect of switching to the present solicitors, the defendant maintained that it was his prerogative and that he did not need the prior approval of the plaintiffs regarding the change.

Whilst I agree that it is the right and prerogative of the defendant to choose counsel whom he thinks would best serve the estate, I cannot endorse the defendant's view that he owes no explanation to the plaintiffs as to why he switched lawyers. Whilst his explanation that the previous solicitors 'were not giving the matter sufficient priority' is a bare statement, I find that even such an explanation if it was proffered to the plaintiffs, which I find was not done, lacked details and particulars, more so when it is clear that the plaintiffs are residing in the United Kingdom.

Wrongly including various items into the assets

The plaintiffs contended that the defendant had wrongly included the deceased's: (a) EPF monies; (b) the Citibank Trust Account; and (c) the Prudential Life Insurance Policy into the deceased's list of assets. However, upon being informed by the plaintiffs' personal solicitors that the abovementioned 3 items do not fall into the category of assets of the estate, the defendant's solicitors then removed items (a) and (b) but not (c).

With regard to the EPF monies, it is clear that one Mrs Susan Wendy Richmond Ong, the mother of the plaintiffs is the beneficiary. This item therefore cannot be included into the list of assets.

The defendant contended that he was directed by an officer of the Inland Revenue Department to include the Citibank Trust Account as part of the deceased's estate, but I find no evidence to this effect. The defendant's contention that there was throughout an ongoing investigation by the Inland Revenue Department pertaining to the deceased's income tax seems to be unsubstantiated as no correspondence nor exhibits have been shown to this effect.

In respect of the Prudential Life Insurance Policy, the defendant had exhibited a letter dated 14 December 1995 from Berjaya Prudential (HBA–7 annexed to encl 8), and had stated that pursuant to the said letter he had included this item under the deceased's assets. A perusal of the said letter shows no such requirement. In any event, it is plain as pikestaff that pursuant to s 23(1) of the Civil Law Act 1956, the said policy of insurance can never form part of the assets of the deceased.

Section 23(1) reads:

> A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and his children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, *and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured* or to be subject to his debts or her debts. (Emphasis added.)

In *Re Man bin Mihat, decd* [1965] 2 MLJ 1, Suffian J (as he then was) held that by virtue of s 23 of the Civil Law Ordinance 1956, as the policy of assurance was effected by the assured on his own life and expressed to be for the benefit of his wife, the moneys payable under the policy did not form part of the estate of the deceased.

Failure to render statement of accounts

The plaintiffs referred to exh HBA–12 which is a statement of accounts prepared by the defendant on 7 April 1197, that is a month after this suit was filed against the defendant. The plaintiffs contended that their earlier repeated requests for accounts of the estate went unheeded. The defendant responds, inter alia, that since no loss has been incurred and proper accounts have been kept by him, the plaintiffs ought not to be allowed to raise this issue. Again I cannot accept this proposition. Surely, the plaintiffs are entitled to be kept informed at least by way of a monthly statement as to the state of affairs of the estate. The defendant could have at least sent the plaintiffs a copy of the bank statement each month, if he was unable to send them proper audited accounts earlier.

Offshore Trust Account

After obtaining the advice of several professionals including tax consultants, the plaintiffs decided to open an Offshore Trust Account as a tax management measure and by letter dated 3 December 1996 requested the defendant to place funds due to the plaintiffs in the said Offshore Trust Account, presumably to avoid taxes. In para 13 of the defendant's affidavit in reply, the defendant acknowledged that this move might enable the plaintiffs to save payment of at least 45% inheritance tax, and the defendant opined that this amounted to tax evasion and he refused to be a part of this 'insidious and illegal scheme' where 'their motive is to receive the cash assets without paying tax' and so his solicitors wrote a letter dated 6 December 1996 to this effect to the plaintiffs. The letters aforementioned

are exhibited in 'RN-10' of the plaintiffs' affidavit in support of the application. A perusal of the letters showed no such exchange taking place. In any event, the defendant could only be right in his view if the Supreme Court's decision in *Lim Kar Bee* v *Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281 (SC) is to apply. In that case, a scheme was devised whereby the appellant, the registered owner of some valuable land in Penang, agreed to sell the land to a company and also executed a trust deed declaring that he held the land in trust for the company. The said company was incorporated together with another company, Lim Kar Bee & Sons Sdn Bhd, the holding company, and were formed in pursuance of a scheme devised by a tax consultant to avoid payment of estate duty payable in regard to the said land if the appellant/landowner died. In the original application before the High Court, the issues that were raised and contested were that the various documents prepared, though signed by the appellant, were not explained to him; that there was misrepresentation by his daughter and that there was also undue influence. In respect of these issues, the learned trial judge came to conclusions against the appellant and granted the order as prayed in the originating summons. The appellant appealed and raised the question of illegality for the first time. The Supreme Court in allowing the appeal held that when the contract is not ex facie illegal, the court can still take judicial notice of illegality and refuse to enforce the contract even though illegality had not been pleaded but only in the situation when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality. Such a situation the court found, existed in *Lim Kar Bee.* The Supreme Court further went on to hold that the real test to be applied in any given transaction seems to be whether the primary purpose of the transaction is to avoid tax; if it is, it is an illegal purpose, that is, of such a nature that, if permitted, it would defeat the tax law in question, thus coming under s 24(b) of the Contracts Act 1950. It held that the primary purpose of the scheme in *Lim Kar Bee* was to avoid paying estate duty, especially bearing in mind that the said land would practically remain with members of the immediate family of the appellant/landowner in the sense that the children and the wife of the appellant/landowner would control exclusively the holding company without the need for them to pay one cent towards the purchase price of the said land. The scheme was therefore illegal. The agreement of sale and purchase of the said land and the subsequent trust deed were therefore unenforceable.

Whilst I am bound by this decision on the principle of stare decisis I must also satisfy myself that either this decision to open the Offshore Trust Account is ex facie illegal or whether it is in any way tainted with some form of illegality for the decision in *Lim Kar Bee* to apply. There is no inheritance tax payable in Malaysia. Further payment of estate duty has since been abolished by the Finance Act 476/92 which came into force on 30 January 1992. Since there is no estate duty payable, can the opening of the Offshore Trust Account be then considered to be an illegal act amounting to tax avoidance or tax evasion? There is no such tax to avoid and therefore, in my judgment, the decision in *Lim Kar Bee* will not affect

A this case and the opening of the Offshore Trust Account. In the circumstances, the defendant was clearly in error in the opinion he held.

Therefore it is open to the beneficiaries to direct the trustees how to manage the trust fund. In *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 at p 637, Walton J said:

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> Now it is trite law that the persons who between them hold the entirety of the beneficial interests in any particular trust fund are as a body entitled to direct the trustees how the trust fund is to be dealt with, and this is obviously the legal territory from which that definition derives. However, in view of the arguments advanced to me by counsel for the respondents, and more particularly that advanced by him on the basis of the decision of Vaisey J in *Re Brockbank* [1948] 1 All ER 287; [1948] Ch 206, I think it may be desirable to state what I conceive to be certain elementary principles. (1) In a case where the persons who between them hold the entirety of the beneficial interests in any particular trust fund are all sui juris and acting together ('the beneficial interest holders'), they are entitled to direct the trustees how the trust fund may be dealt with. (2) This does not mean, however, that they can at one and the same time override the pre-existing trusts and keep them in existence. Thus, in *Re Brockbank* itself, the beneficial interest holders were entitled to override the pre-existing trusts by, for example, directing the trustees to transfer the trust fund to X and Y, whether X and Y were the trustees of some other trust or not, but they were not entitled to direct the existing trustees to appoint their own nominee as a new trustee of the existing trust. By so doing, they would be pursuing inconsistent rights. (3) Nor, I think, are the beneficial interest holders entitled to direct the trustees as to the particular investment they should make of the trust fund. I think this follows for the same reasons as the above.

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F Executor's fees

The defendant had charged the plaintiffs a sum of RM130,000 as his fees. To my mind, this is exorbitant fees. Section 43 of the Probate and Administration Act 1959 reads:

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> Executor's or administrator's commission
>
> (1) The Court may in its own discretion allow the executors or administrators a commission not exceeding five per centum on the value of the assets collected by them, but in the allowance or disallowance of the commission the Court shall be guided by its approval or otherwise of their conduct in the administration of the estate.

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In the circumstances, the power of awarding a commission to the executor lies solely at the discretion of the court after taking into account the conduct of the executor in administering the estate. The defendant, in my view ought not to be allowed to fix an arbitrary figure as his fees. There should be an application to the court under s 43 supported by evidence of his conduct in administering the estate so that the court may assess and make an order allowing him a commission of not more than 5% of the total value of the estate. It is for this purpose that I ordered the fees to be taxed and to be paid by the estate.

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Power of the court to remove and substitute a trustee A

Section 21 of the Civil Law Act 1956 reads:

> Executor deemed to be trustee for person entitled to residue on intestacy
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> When any person dies or has died, having by his will, appointed any person to be his executor, the executor shall be deemed to be a trustee for the B person, if any, who would be entitled to the estate in case the person died intestate in respect of any residue not expressly disposed of, unless it appears by the will that the person so appointed executor was intended to take the residue beneficially.

Therefore, an executor is deemed to be a trustee to the residue of the C estate which is not expressly disposed off.

The definition section of the Trustee Act 1949 defines 'trust' as follows:

> 'Trust' does not include the duties of chargee but with this exception the expressions 'trust' and 'trustee' extend to implied and constructive trusts, D and to cases where the trustees has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative and 'trustee', where the context admits, includes a personal representative, and 'new trustee' includes an additional trustee; ... .

The expression 'trustee' therefore includes the duties incidental to the E office of a personal representative and trustee. William, Mortimer and Sunnucks on *Executors, Administrators and Probate* state at p 731:

> Personal representatives as trustees
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> ...
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> Where property is bequeathed to executors, as trustees, if they prove the F will, this is, in itself, an acceptance of the particular trusts.

I have no hesitation in holding that the defendant was also acting in his capacity as a trustee as well as an executor.

It is also my judgment that O 80 r 2(3) of the Rules of the High Court 1980 gives the court the general power to act in respect of an G executor or trustee as provided under r 2(3)(e) which reads:

> Without prejudice to the generality of paragraph (1) an action may be brought for any of the following reliefs — ...
>
> (e) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court H could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.

It is my judgment that this rule is wide enough to give the court the power to remove or substitute an executor or trustee, from such capacity.

Further, s 45(1)(a) of the Trustee Act 1949 gives the court the power I to appoint new trustees and if it is inexpedient, difficult or impracticable to do so without the assistance of the court, the court may make an order to appoint a new trustee in substitution or in addition to any existing

A trustee. Under s 60(1) of the same Act, an order made under this Act for the appointment of a new trustee may be made upon the application of a person beneficially interested in the land, stock or thing in action.

Except in cases where on the true construction of the will, the gift is contingent on the legatee attaining the given age, it is clear that if there are B several beneficiaries who are all of one mind, and who are not under any legal disability (ie a minor or a mental patient), they may if they so wish, extinguish the trust without reference to the trustees. In *Gosling v Gosling* (1859) John 265, Page Wood VC said:

> C The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age — unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full as soon as they attain twenty-one.

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On a true construction of the will dated 6 March 1989, the testator devised and bequeathed all his movable and immovable property absolutely to his two children to hold in their personal capacities in equal shares. In para 4 of his will, he had provided as follows:

> E In the event the laws of Malaysia or any other country in which any of my properties are situated preclude my named children from holding such properties in their personal capacity until such time as they reach the age of majority of that country, then and only in such event I give absolutely to my trustee the said properties to hold the same in trust for my children until such time as she/they reach the age of majority as aforesaid.

F It is clear from the will that the testator intended the trust to cease upon both his children attaining the age of majority. The two children named in para 2 of the will are Rachael Mei Ling Ong and Natalie Sue Ling Ong who were born on 29 July 1970 and 21 November 1972 respectively and are now 29 and 25 and are above the age of majority respectively. They G should then in accordance with the terms of the will hold the properties in their personal capacities.

In *Commissioners of Inland Revenue v Executors of Hamilton-Russell* [1943] 1 All ER 474 (CA), the testator, GL Hamilton-Russell who attained 21 years of age on 17 October 1928, was the sole beneficiary under a H settlement and thereupon was then in law entitled to call upon the trustees to transfer over to him all the trust fund and all accumulations of income to himself. He did not in fact do so, but allowed the trustees to receive the income from the trust fund and the accumulation fund and to continue investing such income up to 18 January 1939. Luxmoore LJ in delivering the decision of the Court of Appeal held at p 477A as follows:

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> ... Obviously, in the present case, neither GL Hamilton-Russell nor the trustees of the settlement could, after GL Hamilton-Russell attained his majority, have insisted on the continuation of the trusts. The trustees could at any time after the happening of that event, even though GL Hamilton-

> Russell had requested them to continue the accumulations, have refused to do so and, if he had refused to accept a transfer of the trust funds, could have paid them into court just in the same way as GL Hamilton-Russell could, contrary to the wishes of the trustees, have insisted on a transfer to himself of the whole of the trust funds.

The facts in the above case are similar to that in this case, and I would accordingly hold that the same principle of law applies. That being the case, the trust should therefore cease and both children have become entitled and the benefit has since their attainment of the age of majority become vested in them in their personal capacities.

Further in *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd*, Walton J said at p 637E:

> ... Moreover, it appears to me that once the beneficial interest holders have determined to end the trust they are not entitled, unless by agreement, to the further services of the trustees. Those trustees can of course be compelled to hand over the entire trust assets to any person or persons selected by the beneficiaries against a proper discharge, ...

I am further fortified in my view of this, when I find as a fact the existence of hostility between the beneficiaries and the defendant executor. When it becomes necessary for either party to deal with each other only through lawyers, and when suspicion and antagonism emanate, the rubric of the trust collapses.

In *Letterstedt (Now Vicomtesse Montmort) v Broers & Anor* (1884) 9 AC 371 at p 389, Lord Blackburn said:

> It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.
>
> Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have been performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

In the case before me, the plaintiffs have similarly accused the defendant of overcharging and of dereliction of duty. To my mind, it is unpalatable for the defendant to continue to perform this onerous task. It is obvious that the parties are unable to work together for the benefit of the estate. Besides, even the defendant has complained that this work is indeed affecting his physical health and his job as a consultant. In the circumstances, it is my judgment that there is sound reason to excuse the defendant from being the executor/trustee of the estate and to put an end to the administration of the estate by the executor since both the beneficiaries are now majors and are personally entitled to the assets of the estate. After all, even the defendant agrees that almost 90% of the administration of the deceased's estate has been duly completed. Accordingly, the plaintiffs

being of full age shall be made administrators of the balance of the estate thus far unadministered.

Since the defendant contends that the tax due to the Inland Revenue Department by the deceased for year 1995–1996 has yet to be paid, I hereby direct that out of the said estate, a sum of RM250,000 be reserved for the payment of the said taxes before the plaintiffs share equally the assets beneficially. I also give leave for either party to apply.

As for costs, it is my judgment that the proper order is that each party is to pay its own costs.

Order accordingly.

Reported by Loo Lai Mee